

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by ) SPB Case No. 21733  
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 R ■■■■■ M ■■■■■ ) **BOARD DECISION**  
 ) (Precedential)  
 )  
 From dismissal from the position ) **NO. 94-23**  
 of Correctional Officer at the )  
 California Men's Colony, Department )  
 of Corrections at San Luis Obispo ) July 6, 1994

Appearances: Benjamin C. Sybesma, Assistant Chief Counsel, California Correctional Peace Officers Association on behalf of Appellant, R ■■■■■ M ■■■■■; Martin H. Milas, Supervising Deputy Attorney General on behalf of Respondent, California Department of Corrections.

Before: Carpenter, President; Ward, Vice President; Stoner and Bos, Members.

**DECISION**

This case is before the State Personnel Board (SPB or Board) for determination after the Board granted a Petition for Rehearing of the Proposed Decision of the Administrative Law Judge (ALJ) awarding back pay after R ■■■■■ M ■■■■■ (M ■■■■■ or appellant) was reinstated to the position of Correctional Officer with the California Men's Colony, Department of Corrections (Department or Respondent).

The Board granted the petition for rehearing primarily to address the issues of the time periods to be considered in calculating back pay and offsets from the back pay award. The parties submitted written briefs on these issues. In addition, appellant also argues that he is entitled to certain benefits which purportedly arise out of a series of

(M [REDACTED] continued - Page 2)

Memorandums of Understanding which pertain to the period in question.

The Board has reviewed the record and the written briefs of the parties and has listened to oral argument. The Board determines that back pay and benefits should not be paid for the period April 21, 1987 to October 4, 1988 for the reasons that follow.

#### **BACKGROUND**

Appellant was dismissed from the position of Correctional Officer effective December 30, 1986. Appellant appealed. On April 21, 1987, at the SPB hearing, the ALJ dismissed the appeal as untimely. On July 21, 1987, the Board adopted the ALJ's Proposed Decision dismissing the appeal. Appellant then filed a Petition for Rehearing which the Board denied on October 20, 1987.

On January 19, 1988, appellant filed a Petition for a Writ of Mandate in the San Luis Obispo (SLO) County Superior Court challenging the dismissal of the appeal. Judge Barry Hammer of the SLO County Superior Court ultimately granted the petition, remanding the proceeding to the Board for a hearing on the merits.

In remanding the proceeding, Judge Hammer ordered the Board to "reconsider its actions and hear the appeal on the merits in light of this court's findings." Judge Hammer explained that his ruling was based on the fact

(M [REDACTED] continued - Page 3)

that appellant had "presented additional evidence which demonstrate[d] good cause for allowing a late appeal." Judge Hammer also found that appellant was "tardy in the presentation of additional evidence such that [he] is the cause of the delay between [his] original hearing conducted on April 27, 1987<sup>1</sup> and the further hearing on the merits mandated by this judgment." (emphasis added).

Judge Hammer included in his Order the following:

(3) In the event that the petitioner prevails in whole or in part on the merits of his appeal, the State Personnel Board, when determining whether back pay is due to petitioner, will take into account the delay caused by the petitioner.

On July 26, 1988, the Board, as instructed by the court, set aside its decision of July 21, 1987 and remanded the matter to a hearing before an ALJ.

On October 4, 1988, an SPB hearing was held at the California Men's Colony in San Luis Obispo. A second day of hearing took place on October 20, 1988. On April 7, 1989, the ALJ issued a Proposed Decision on the merits modifying the dismissal to a medical termination. On April 11, 1989, the Board rejected the ALJ's Proposed Decision. After briefing and argument, the Board modified appellant's dismissal to an Official Reprimand at its meeting October 9 and 10, 1990.

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<sup>1</sup>All parties agree that the correct date of the original hearing was April 21, 1987.

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On November 8, 1990, the Department filed a Petition for Rehearing before the Board which the Board denied on January 22, 1991. On March 14, 1991, the Department filed a Petition for a Writ of Mandate challenging the Board's decision which was denied on October 1, 1991 by Judge Barry Hammer. On December 2, 1991, appellant was reinstated as a Correctional Officer.

The Department accepted liability for back pay for the period January 1, 1987 through November 30, 1991, excepting the period between April 21, 1987 and October 9, 1990, the date the Board modified appellant's dismissal to an Official Reprimand. The Department paid appellant \$33,754 on June 8, 1992. Appellant disputed the Department's use of the October 9, 1990 date in calculating the amount of back pay owed. Appellant again requested a hearing.

On September 3, 1993, the ALJ issued her Proposed Decision on Back Pay which the Board adopted at its meeting on September 7 and 8, 1993. On October 7, 1993, appellant filed a Petition for Rehearing on the Decision on Back Pay which the Board granted on January 6, 1994.

#### **ISSUES**

Although the Board did not limit the parties right to discuss other issues, in granting appellant's Petition for

Rehearing, the Board invited particular discussion on the following issues:

a) What is the period of time encompassed by the superior court's order of May 26, 1988 as it pertains to appellant's delay and the effect of the delay on the back pay award?

b) What is the appropriate period for which outside earnings should be deducted from appellant's back pay award?<sup>2</sup>

#### **DISCUSSION**

##### Time Period Excluded from Back Pay Award

Government Code § 19584 provides in pertinent part:Whenever the board revokes or modifies an adverse action and orders that the employee be returned to his or her position, it shall direct the payment of salary and all interest accrued thereto, and the reinstatement of all benefits that otherwise would have normally accrued.

In granting appellant's writ of mandate setting aside the Board's dismissal of his appeal, the superior court found that appellant failed to present evidence to the ALJ which would have demonstrated good cause for allowing appellant's late appeal. In addition, the court made a finding that the delay caused by appellant was the time period between the original hearing, April 21, 1987 and the "further hearing on the merits." Finally, the court ordered that, if a back pay award

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<sup>2</sup> In her Proposed Decision, the ALJ deducted all of appellant's outside earnings from his back pay award.

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should be necessary, the Board was to take into account the delay caused by appellant.

In arguing that appellant is owed no back pay from April 27, 1987 until October 26, 1990, the Department would have us interpret the term "further hearing on the merits" to include the hearing, findings and the Board's ultimate decision. For his part, appellant would have us determine that the time period should be April 21, 1987 to May 26, 1988, the day the superior court remanded the case back to the Board.

We will not read ambiguity into the term "further hearing." We find that the term "further hearing on the merits" refers to the day the SPB hearing on the merits was reasonably convened after remand -- October 4, 1988. This interpretation puts appellant in exactly the same position he would have been had he properly brought evidence of good cause for filing an untimely appeal to the original hearing. Had appellant presented to the ALJ the evidence he ultimately presented to the superior court, the hearing on the merits would have begun on April 21, 1987, the first day of hearing before the ALJ. Because of delay by appellant, however, the first day of the hearing was not April 21, 1987 but October 4, 1988. Any further delay was attributable not to appellant's actions but to the Board's normal processing of the case.

Offset Limited to Time Period in which Back Pay is Due

Government Code § 19584 provides for payment of salary and interest accrued when an appellant is returned to work. Section 19584 also provides:

From such salary due there shall be deducted compensation that the employee earned or might reasonably have earned, during any period commencing more than six months after the initial date of the suspension.

After determining that a number of months should be excluded from the calculation of appellant's back pay, the ALJ ordered that all of appellant's earnings from other employment be deducted from the total back pay award. This was error. The Board finds, and both parties agree, that appellant's earnings outside the period for which the Department must pay back pay are not to be deducted as an offset against his back pay award.

Merit Salary Adjustment

Appellant argues that he has a right to merit salary adjustments (MSAs) because, had he not been terminated, he would have been paid these merit salary adjustments. Government Code § 19832 provides in pertinent part:

(a) After completion of the first year in a position, each employee shall receive a merit salary adjustment equivalent to one of such intermediate steps during each year when he or she meets such standards of efficiency as the department by rule shall prescribe.

Subdivision (b) provides that if there is a conflict between subdivision (a) and a Memorandum of Understanding (MOU), the MOU controls. Three separate MOUs cover the time period at issue here. All contain the following identical language:

§ 16.03 Merit Salary Adjustment

Employees shall receive annual merit salary adjustments in accordance with Government Code Section 19832 and applicable Department of Personnel Administration rules.<sup>3</sup>

Under both section 19832 and the applicable Department of Personnel Administration (DPA) rules, the employee must meet "the standards of efficiency required for his position." (See DPA Rule 599.683). The process under which an MSA is granted requires the appointing authority to certify that the employee has met the standards of efficiency required for the position. (DPA Rule 599.683).

Thus, in order for an employee to be eligible for an MSA, the Department must certify his or her efficiency. Appellant was not at work and the Department properly declines to

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<sup>3</sup>The applicable Department of Personnel Administration (DPA) rules consist of DPA Rules 599.683 through 599.687. The rules are contained in Title 2 of the California Code of Regulations.

certify his efficiency. Consequently, appellant is not eligible for the MSA.<sup>4</sup>

Appellant claims the Department should be estopped from arguing that appellant was not eligible for MSAs since, at the time appellant was finally returned to work, he was paid as if he had been awarded MSAs during the time he was absent.

The Board may not award improper salary adjustments. In Geftakys v. State Personnel Board (1982) 138 Cal. App. 3d 844, a hearing officer was erroneously placed in a salary range two pay steps higher than her proper placement. The court of appeal held that:

The Board had no authority to leave appellant at a place in the pay structure where she had been placed by clerical, mechanical, or computer error and contrary to the statutes and rules governing the civil service. The Board could not make a gift of public money. (Cal. Const., art. XVI, § 6.) Id. at 864.

Thus, the Board has no authority to order that appellant continue to receive MSAs erroneously awarded.

Out of Pocket Medical and Dental Expenses

Government Code § 19584 provides in pertinent part:

Benefits shall include, but shall not be limited to, retirement, medical, dental, and seniority benefits pursuant to memorandum of understanding for that

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<sup>4</sup>We note, however, that the DPA rules may provide a process by which an appellant may grieve the denial of an MSA. See DPA Rule 599.684.

classification of employee to the employee for such period of time the board finds the adverse action was improperly in effect.

Due to delay caused by appellant, appellant's adverse action cannot be considered "improperly in effect" during the time period April 21, 1987 and October 4, 1988. Appellant's medical and dental expenses for this period of time are to be excluded from reimbursement.

Uniform Allowance/Physical Fitness Incentive Pay

Appellant argues that he should be compensated under the terms of the MOU for the Uniform Allowance he would have received during the time he was not working. Appellant claims that the Uniform Allowance is a benefit as described in Government Code § 19582 and defined in Swepton v. State Personnel Board (1987) 195 Cal. App. 3d 92. Appellant is mistaken.

In Swepton, the court of appeal found that overtime is not a benefit under Government Code § 19584 because it is not of the same general nature or class as the other benefits enumerated in section 19584, i.e., "retirement, medical, dental, and seniority benefits pursuant to memoranda of understanding." Id. at 97. Likewise, an Annual Uniform Replacement Allowance (also known as a Uniform Allowance) is not a benefit of the type listed in section 19584.

(M [REDACTED] continued - Page 11)

This common sense finding is in accord with the laws and rules governing Uniform Replacement. The MOUs covering the time periods at issue all contain the same general information, although the amount of the allowance has increased over the years. All three MOUs contain the language: "All other State laws, rules and departmental policies regarding uniform shall remain in effect."

Government Code 19850.1 provides in part:

State employees shall be responsible for the purchase of uniforms as required as a condition of employment. The state shall provide for an annual uniform allowance to state employees for the replacement of uniforms worn on a full time basis . . . in amounts agreed upon in a memorandum of understanding. . ."

Thus, the state law upon which the uniform allowance rules are

based requires that uniforms subject to a replacement allowance be "worn on a full time basis." In addition, DPA Rule § 599.731 provides in pertinent part:

Departments should note that in some cases not all employees in particular classifications are required to wear uniforms. Departments shall ensure that these employees are not included in the uniform allowance.

Consequently, if a Department found that, no matter what his classification, an employee was not required to wear a uniform, he could and should be excluded from receiving a uniform allowance. We find that the Department is not

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required to pay a Uniform Allowance for the years appellant did not work.

Based on the same reasoning, the Physical Fitness Incentive Pay that appellant claims as a benefit under Government Code § 19584 is also denied.

#### Interest

In I [REDACTED] v. M [REDACTED] (1994) SPB Dec. No. 94-08, the Board held that it was not bound by the interest rate established by the Code of Civil Procedure for court judgments and determined that, henceforth, the proper interest rate under Government Code § 19584 should be 7%. This change, however, is prospective only.

Id. at 12. In accordance with the Board's past practice, interest on back pay awarded prior to the issuance of M [REDACTED] is to be computed at 10% per year. Id.

Since the back pay was awarded before M [REDACTED] became final, appellant shall be paid interest at the rate of 10 percent per year.

#### **ORDER**

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is hereby ORDERED that:

1. Appellant is not eligible for back pay for the period April 21, 1987 to October 4, 1988.

2. Earnings obtained during the period appellant is ineligible for back pay are not to be used to offset the back pay award.

3. Appellant is not to be reimbursed for dental and medical claims that pertain to the time period he was ineligible for back pay.

4. Appellant is not eligible for Merit Salary Adjustments, Uniform Allowance or Physical Fitness Incentive Pay for the period during which appellant was not working.

5. Interest on appellant's back pay award shall be paid at 10% per year.

6. This matter is hereby referred to the Administrative Law Judge and shall be set for hearing on written request of either party in the event the parties are unable to agree as to the salary and benefits due appellant.

7. This opinion is certified for publication as a Precedential Decision (Government Code § 19582.5).

\*THE STATE PERSONNEL BOARD

Richard Carpenter, President  
Lorrie Ward, Vice President  
Alice Stoner, Member  
Floss Bos, Member

\* Member Alfred R. Villalobos was not present when this decision was adopted.

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I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on July 6, 1994.

GLORIA HARMON  
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Gloria Harmon, Executive Officer  
State Personnel Board